87-1335

No. _____

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1988

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RONALD A. BRAVERMAN,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

—o—

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

—o—

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QUESTIONS PRESENTED

1. In light of the charging perjury statute, 18 U.S.C. § 1623, and its express congressional intent and purpose to afford a right of recantation to even knowing, intentional perjurers, is it a violation of both the Sixth Amendment and the Due Process Clause of the Fifth Amendment, as well as supervisory fairness, for an immunized federal grand jury witness' retained counsel to fail to advise him of his statutory right of recantation and to fail to take any steps whatsoever to permit either evaluation or implementation of that recantation right, and where neither the government, nor the grand jury foreperson, nor the trial court which immunized and ordered the witness' testimony, advised the witness of that right—thereby requiring dismissal of the witness' subsequent indictment under 18 U.S.C. § 1623 for his alleged perjurious grand jury testimony?

2. As the result of various ambiguities, imprecisions and divergences in and between (i) the questions and answers constituting Petitioner's allegedly false testimony as quoted in the charges, (ii) the indictment's statement of the alleged contrasting truth, and (iii) the frequent *paraphrasings,* within such "truth paragraphs," of the previously quoted alleged falsehoods—among other related defects, do the surviving counts of Petitioner's indictment under 18 U.S.C. § 1623 charge him with "perjury by implication," or are they otherwise legally insufficient, within the meaning, principles and approaches of *Bronston v. United States,* 409 U.S. 352 (1973), and its progeny in the circuits? In holding that some but not all of the perjury charges against Petitioner should have been dismissed on account of such defects in the indictment, is the Sixth Cir-

cuit's decision in this case in conflict with the limitations on federal perjury prosecutions articulated by this Court in *Bronston v. United States, supra,* as well as the rules fashioned by other circuits, especially those developed in light of *Bronston,* with respect to the criteria to be used by courts in evaluating facial challenges to perjury indictments and in determining the legal sufficiency of such charges? In so holding, has the Sixth Circuit also so far departed from its own applicable decisions, as to call for the exercise of this Court's supervisory powers to correct a miscarriage of justice which Petitioner has thereby suffered? Does the conflicting and confusing state of the law of perjury in the various circuits in all these respects, as it has evolved since *Bronston,* demonstrate a critical need for this Court to clarify that law and unify it?

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OPINIONS BELOW

The opinions below, none of which were published, are described in the statement of *jurisdiction, infra.*

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JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1). The opinion of the United States Court of Appeals for the Sixth Circuit in *United States of America v. Ronald A. Braverman* was entered on September 25, 1987,

and is printed in Appendix A. That Court's order denying both rehearing and suggestion for rehearing *en banc,* which is printed in Appendix C, was entered on December 10, 1987. On July 17, 1985, the United States District Court for the Northern District of Ohio, Eastern Division, Hon. Ann Aldrich Presiding, also entered a memorandum and order, which is printed in Appendix B.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

UNITED STATES CONSTITUTION

Amendment 5

No person shall . . . be deprived of life, liberty, or property, without due process of law . . . .

Amendment 6

In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence.

PROVISIONS FROM UNITED STATES CODE

18 U.S.C. § 1623 is printed in Appendix D.

STATEMENT OF THE CASE

On March 7, 1984, Petitioner was indicted under 18 U.S.C. § 1623 on seven counts of perjury allegedly committed during the course of his "use" immunized testi-

mony before a federal grand jury sitting in Cleveland, Ohio, on December 2 and 3, 1981.

The District Court (which had jurisdiction under 18 U.S.C. § 3231) considered two pretrial motions to dismiss, one of which attacked the indictment on account of the self-acknowleged ineffective assistance of Petitioner's grand jury counsel. The other motion challenged the legal sufficiency of each count due to various ambiguities, imprecisions and divergences in and between the allegedly false testimony as quoted in the charges, and the allegations of the indictment's "truth paragraphs"—among other related defects.[1]

In summary rulings (Appendix B), the District Court denied the ineffective assistance motion, dismissed Counts II and V(C) as legally insufficient, but otherwise upheld the indictment. Petitioner thereafter entered a conditional plea of guilty under Fed.R.Crim.P. 11, to the remaining counts, preserving for appeal the adverse rulings on his motions to dismiss. He was later sentenced to six, concurrent one-year and one-day sentences, along with consecutive fines of $10,000 per count for a total fine of $60,000.

On appeal, Petitioner renewed his ineffective assistance claims and facial attacks on the indictment. The Sixth Circuit *reversed* the District Court's judgment *in part*, holding that Counts IV and V(D) were legally insuf-

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[1] Among its various other assigned defects, the indictment (reproduced in Appendix F) contains, within its "truth paragraphs," the novel feature of frequently inaccurate para*phrasings* of the previously quoted alleged falsehoods. As another ground of dismissal, the ineffective assistance motion asserted unfair government tactics and procedures in the grand jury appearances and in returning the indictment.

ficient and should have been dismissed, but otherwise *affirmed* the conviction. The case was ordered *remanded* to the District Court with instructions to modify its judgment and sentence consistent with the Sixth Circuit's opinion (Appendix A).

The facts pertinent to this Petition are undisputed:

Except for this case, Petitioner has never had any contact whatsoever with any aspect of the criminal justice system, as a grand jury or other witness, or defendant.

In late September of 1981, Petitioner, a Los Angeles resident, was subpoenaed to testify before the subject grand jury in Cleveland and retained a Beverly Hills attorney ("California counsel") to represent him in the matter. Early on, that counsel learned that Petitioner was not the target of the grand jury's investigation into possible income tax and related violations. Compliance with the subpoena was initially via voluntary production of various business records on October 26, 1981, followed by an informal all-day interview with IRS agents on October 27, 1981. Thereafter, following the grant of formal "use" immunity (18 U.S.C. §§ 6002-03), Petitioner testified before the grand jury on December 2 and 3, 1981. The testimony had been scheduled for one day, but at the end of the first day, the government extended the appearance to include an unexpected second day. Petitioner's California counsel, who had accompanied him on the first day, was unable to stay for the second day. When, at the conclusion of the first day's testimony, government counsel advised Petitioner and his California counsel that the testimony would continue the next day, the latter merely obtained another lawyer ("Cleveland counsel") and spent a few minutes

briefing new counsel about the matter. California counsel then returned to Los Angeles, leaving Petitioner to be represented by Cleveland counsel, a stranger to the case, to criminal representation generally, and to grand jury representation in particular.[2] Petitioner went forward with the December 3rd appearance.[3]

Petitioner's March 1984 perjury indictment followed in the wake of his grand jury counsels' uncontradicted, self-acknowledged failures to provide him with numerous standard preparatory and ongoing advice and assistance, before, during and after his December 1981 two-day appearance. Among the many undisputed unprofessional errors committed, those which *necessarily* pertain to this Petition involve the failures to inform Petitioner of, or to otherwise provide him *any* assistance regarding the critical right of recantation under the charging perjury statute, 18 U.S.C. § 1623.[4]

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[2] While no formal motion to continue was made, Cleveland counsel, on the morning of the second day, did ask government counsel to reschedule that appearance to a date when California counsel could be present, but that request was refused on the ground that Petitioner "faced no jeopardy since he had been immunized." The government also advised that contempt sanctions would be sought if he did not testify on that day.

[3] Six of the seven original perjury counts relate to that second day's testimony, including five counts which relate *solely* to that testimony (when Cleveland counsel represented Petitioner). The *only* count relating *solely* to the *first* day's appearance (Count II) was dismissed.

[4] While Petitioner contends that such *recantation*-related ineffectiveness itself requires reversal, his grand jury counsels' myriad *other* unprofessional errors are also relevant to the question presented, since those other errors made the omitted advice and assistance regarding *recantation* absolutely necessary as

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Petitioner's counsel never advised him to (and thus he did not) write down every question asked him and his answers to those questions, nor to leave the grand jury room often, let alone after every question, in order to confer with counsel about and before answering each question and to create an ongoing record of the testimony for purposes of evaluating the need to recant and, where appropriate, implementing Petitioner's statutory recantation rights.[5] Neither counsel ever debriefed Petitioner nor otherwise created a record of the questions asked and the answers given by him at either of his appearances. Neither counsel ever debriefed or asked Petitioner to review his testimony with an eye towards determining if there was any portion of it which he wanted to correct, clarify or modify. Neither counsel obtained a transcript of either the first day's testimony (so that, *e.g.*, it might be reviewed with Petitioner prior to his second day's appearance) or the second day's testimony—nor does the record reflect any attempt to obtain such transcripts.

At no time did either counsel advise Petitioner of the existence of his statutory right to recantation, nor of anything pertaining to that right, nor did the government, the grand jury foreperson, or the trial court which immunized and ordered his testimony, so advise Petitioner. It was

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curative measures. For example, by their own admission, counsel had no idea of the testimony as it developed and never monitored it as to its precision, clarity, etc. They never instructed Petitioner to request his interrogators to simplify or otherwise clarify any complex, ambiguous or otherwise imprecise or confusing questions, and that failing to receive such clarification he should refuse to answer.

[5] In fact, during the entire course of his two days of testimony, Petitioner left the grand jury room *only* 6 times.

only years later, after his indictment, that Petitioner first obtained and read a copy of his grand jury transcript and became aware that there was a statutory mechanism (i.e., recantation) by which he could have corrected any errors in his testimony, thereby totally preventing a perjury prosecution under 18 U.S.C. § 1623—the statute he was indicted for allegedly violating.

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REASONS FOR GRANTING THE WRIT

I

IN TOTALLY FAILING TO ADDRESS THE UNDISPUTED FAILURES OF PETITIONER'S GRAND JURY COUNSEL TO INFORM HIM OF, OR TO OTHERWISE PROVIDE HIM EFFECTIVE ASSISTANCE REGARDING THE CRITICAL RIGHT OF RECANTATION UNDER THE CHARGING PERJURY STATUTE, 18 U.S.C. § 1623, THE SIXTH CIRCUIT'S DECISION IGNORED A QUESTION OF EXCEPTIONAL IMPORTANCE WHICH REQUIRES RESOLUTION BY THIS COURT.

In his appeal, Petitioner asserted, *inter alia,* that his grand jury counsels' undisputed failures to comply with numerous universal federal grand jury witness representational practices before, during and after his appearance, require dismissal of his indictment, not only under the Sixth Amendment and Due Process Clause of the Fifth Amendment, but also as dictated by fundamental supervisory fairness.

While acknowledging the right of such witnesses to consult with and be assisted by counsel *outside* the grand

jury room, the Sixth Circuit's opinion (the "opinion") (App. 4-7) disposed of and rejected those ineffective assistance claims solely with reference to the issue of whether such witnesses have a Sixth Amendment right to counsel and, if so, whether that right affords protection against the commission of perjury. However, the opinion's treatment of that issue misses a much narrower question of exceptional importance which the Court ignored concerning the main thrust of Petitioner's ineffective assistance claims: his grand jury counsels' failures regarding the critical right and defense of recantation under subsection (d) of the charging statute, 18 U.S.C. § 1623 (reprinted in Appendix D).

The opinion's treatment of that Sixth Amendment issue concluded (App. 6) that "[e]ven if [Petitioner] had a Sixth Amendment right to counsel . . . [that] right provides [no] protection for the commission of perjury. 'Our system provides methods for challenging the government's right to ask questions—lying is not one of them. A citizen . . . cannot with impunity knowingly and deliberately answer with a falsehood.' *Bryson v. United States*, 396 U.S. 64, 72 (1969)." However, the opinion thus totally missed Petitioner's point that, with the enactment of 18 U.S.C. § 1623 in 1970, our statutory system *does* provide even knowing and deliberate perjurers with such a right and is designed to encourage them to recant their falsehoods with total impunity under the very statute[6] that

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[6] Ironically, in one of the cases cited by the opinion, *United States v. Brown*, 666 F.2d 1196, n.2 at 1199 (8th Cir. 1981), *cert. den.*, 457 U.S. 1108 (1982), the defendant witness was indicted

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Petitioner was indicted for allegedly violating and of which he stands convicted. The record is uncontradicted that Petitioner was never advised and remained unaware of that statutory recantation right until his present counsel discussed it with him *after* his indictment. By then, of course, it was too late. Ironically, given the unusual twenty-eight month period between testimony and indictment, the period in which recantation could have usefully been effected was substantially longer than the norm.

The opinion totally failed to address the undisputed failures of grand jury counsel both to advise Petitioner of his statutory recantation right, and to take any steps to evaluate or implement that right according to universally accepted standards of federal grand jury witness representation, including such practices as preparation of counsel's own record of testimony, seeking a transcript, and

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for perjury under § 1623 only *after* a public defender was appointed precisely for purposes of representing him when he was later recalled to the grand jury and given the opportunity to *recant* his prior testimony.

Moreover, relief from ineffective assistance does not even depend upon "actual innocence," *Kimmelman v. Morrison*, 477 U.S. 365, 106 S.Ct. 2574, 2586 (1986), *United States v. Bowers*, 517 F.Supp. 666, 670 (W.D.Pa. 1981) [charges dismissed for counsel's *pre*-indictment ineffectiveness]. Effective assistance is due both the "innocent and guilty alike," *Kimmelman, Id.*— even those "who may later be accused of perjury," *Whiteside v. Scurr*, 750 F.2d 713, 714, *den'g. reh'g. en banc* in 744 F.2d 1323 (8th Cir. 1984), *rev'd.* on other grounds, *sub. nom., Nix v. Whiteside*, 475 U.S. 157 (1986). "Even guilty individuals are entitled to be advised of strategies for their defense." *United States v. Levy*, 577 F.2d 200, 209 (3rd Cir. 1978).

witness debriefing.[7] Proper representation of Petitioner, according to those omitted practices, would have assured that any errors, inaccuracies, inconsistencies, misstatements, or falsehoods in his testimony would have been identified, evaluated, corrected and, where appropriate, *recanted.*

The right of recantation was thereby "irretrievably lost" to Petitioner; he was thereby deprived of the very method statutorily created by Congress as a critical part of the investigative process, to be utilized by those in Petitioner's shoes in order to spur the fact-finding process by permitting them to avoid prosecution for the offense. *Hamilton v. Alabama*, 368 U.S. 52, 54 (1961).

This Court is respectfully urged to grant *certiorari* with respect to the issue of whether such *recantation*-related ineffective assistance (especially in the face of the failures of the government, grand jury foreperson and immunizing court to inform the witness of his statutory recantation right) requires dismissal of the subject indictment on any or all of the following bases:

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[7] Counsel's own cumulative record must be made, based upon consultations during the testimony, the witness' memory and/or notes taken while in the grand jury room. Counsel should move for a transcript prior to and at the conclusion of testimony, as a further (and more accurate) check against any errors and to avoid conflicting testimony, and to make effective use of the recantation right. The witness must also be vigorously debriefed so as to review and evaluate with him the questions and answers, what the questions meant to him, and to determine whether the responses were reasonable, and to identify any areas in need of clarification or correction.

(1) *Constitutional Bases*: Either a *limited* Sixth Amendment[8] or Fifth Amendment due process right to effective assistance regarding recantation (at the very least with respect to notice of recantation), or a general

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[8] The following should be emphasized with respect to the opinion's treatment (App. 4-6) of the broader issue of a grand jury witness' *Sixth* Amendment right to counsel *in general: Kirby v. Illinois,* 406 U.S. 682 (1972), did not consider *any* issues regarding the rights of such witnesses and was also merely a *plurality* opinion. In fact, as Justice Brennan himself pointed out in his concurrence in *United States v. Mandujano,* 425 U.S. 564, 603 (1976), *no* case in this Court "has squarely presented the question."

Contrary to the Sixth Circuit's related suggestion, in strenuously contending that such witnesses are constitutionally entitled to some degree of assistance, that concurrence, while focusing a great deal on the need to protect such witnesses' Fifth Amendment privilege, was careful to emphasize that it did *not* purport to define the exact dimensions of their constitutional rights to counsel—especially since the issue was not before the Court. *Id.* at 607-608. Indeed, many of the cases cited by Justice Brennan (*Id.* n. 23 and text at 606), as illustrating the rights to counsel's assistance outside the grand jury room, involved *immunized* witnesses (including a case chiefly relied upon by the Sixth Circuit's opinion, *United States v. George,* 444 F.2d 310, 314 (6th Cir. 1971) [*transactional* immunity]), thereby belying the Sixth Circuit's further suggestion that immunized witnesses have an attenuated need for protection under the Sixth Amendment. Of course, with respect to the critical matter of *recantation,* immunized witnesses have certainly the same, and often much more need for counsel's assistance than do *non*-immunized witnesses.

Finally, the *dicta* at the page in the *Mandujano plurality* opinion, 425 U.S. 581, to which the Sixth Circuit cites as suggesting that there is no such Sixth Amendment right whatsoever, has been interpreted as reflecting only the law that counsel may not be present *inside,* Note, *Recent Developments in the Law of the Federal Grand Jury,* 1977 Utah L.Rev. 170, n. 259 and text at 210, and thus, as the source of witnesses' rights to counsel *and* effective assistance *outside* the grand jury room. *In re Grand Jury Subpoena (Samuelson),* 739 F.2d 1354, 1357-59 (8th Cir. 1984) [citing *Mandujano and Strickland v. Washington,* 466 U.S. 668 (1984)]. Indeed, the Sixth Circuit also cites to the same passage in *Mandujano* for what that court acknowledges is the right to counsel's assistance outside the grand jury room.

due process right[9] to effective assistance of grand jury counsel, as premised upon what the opinion acknowledges is the right to counsel's assistance outside the grand jury room; and

(2) *Supervisory Power Bases:* The dictates of supervisory fairness, or as the result of supervisory enforcement of the statutory recantation right and the overriding congressional intent and purpose behind it according to a simple narrow supervisory rule which Petitioner has proposed throughout this case, as follows.

The purpose of § 1623(d)'s recantation provisions is to discover the truth by eliminating the witness' liability. *See* 2 U.S. Cong. Code & Admin. News pp. 4023-24 (1970); *In re Craven* (N.D.Cal. 1973), 13 Crim. L.Rep. 2100 (BNA, May 2, 1973) (unpublished decision reprinted in Appendix E).[10] In short, Congress wanted the truth even if it meant letting a perjurer "off the hook." *See also United States v. Clavey*, 565 F.2d 111, 124 (7th Cir. 1977) (Swygert, J. dissenting), *aff'd. by an equally divided court on reh'g. en banc*, 578 F.2d 1219 (7th Cir. 1978), *cert den.*, 439 U.S.

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[9] The opinion ignored Petitioner's separate contention that, distinct from the Sixth Amendment, due process itself affords a right to effectiveness of counsel in grand jury proceedings in light of decisions such as *Evitts v. Lucy*, 469 U.S. 387 (1985), *United States v. Alvarez*, 580 F.2d 1251, n. 5 and text at 1256 (5th Cir. 1978) and *United States v. Bowers, supra*. The opinion limited its very different summary due process inquiry to whether dismissal was required due to unfair government tactics and procedures (App. 6).

[10] *In re Craven, supra*, held that, in and of themselves, the recantation provisions of § 1623 provide sufficient reason for a witness to prospectively secure a transcript of any testimony he might give before the grand jury, in light of "Congress' intent that the Grand Jury should be more concerned with getting at the truth than with obtaining perjury convictions."

954 (1978).[11] That congressional purpose of § 1623(d) can be vindicated, and all of the competing rights and interests of the government, the witness and the criminal justice (including the grand jury) system fully and easily accommodated, only by requiring that not later than the conclusion of an appearance, the government or grand jury foreperson give the witness written notice of the recantation provision. Alternatively, such notice could be printed on the grand jury subpoena itself.[12]

The recantation right is *absolutely* meaningless and the congressional purpose behind it *totally* frustrated unless witnesses are *specifically* advised of it. The burden on the government under the proposed supervisory rule is *non-existent* weighed against the critical, congressionally mandated need for such a practice and the enormous benefits to the entire testimonial system. If only on that basis, and even apart from fundamental fairness and other, constitutional considerations[13] it is submitted that such con-

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[11] "[That] congressional purpose is frustrated if witnesses are not able to obtain the assistance of counsel in determining whether to exercise [their recantation rights]. . . . Without knowing what his client has said, defense counsel is in no position to give legal advice or even determine whether there was anything to recant." *United States v. Clavey, Id.*

[12] *Cf. United States v. Brown, supra,* 666 F.2d at 1198 and *United States v Daniels,* 461 F.2d 1076, 1077 (5th Cir. 1972) *(per curiam),* wherein prior to testifying, each witness was given written advice of the right to consult with counsel.

[13] With respect to those considerations, however, there exists on the uncontradicted record in this case the requisite "reasonable probability . . . sufficient to undermine confidence in the outcome," that "but for counsel[s'] unprofessional errors, the result of the proceeding would have been different," *Strickland,*

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gressionally mandated policies require this Court's review and reversal in this case.[14]

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supra, 466 U.S. at 694; *Kimmelman, supra*, 106 S.Ct. at 2583; *Whiteside, supra*, 106 S.Ct. at 999—*i.e.*, Petitioner would *not* have been indicted—*even apart* from counsels' numerous *other* unprofessional errors which made their omitted advice and assistance concerning *recantation* absolutely necessary as curative measures.

And given how that *reasonable probability/but-for* Sixth Amendment standard is grounded in considerations of *fundamental fairness* as "the ultimate focus of inquiry," *Strickland, supra*, 466 U.S. at 696-98, the manifest satisfaction of that standard, in this case, *a fortiori* establishes due process and supervisory fundamental *un*fairness sufficient to compel dismissal of the indictment.

[14] *Cf. Nix v. Whiteside, supra*, 106 S.Ct. at 993-999 [treatment of client's *proposed* perjury, which persuaded him to testify *truthfully* at his criminal trial, *held* to constitute effective assistance, especially in light of our justice system's overriding dedication to "a search for the truth"].

II

IN HOLDING THAT SOME BUT NOT ALL OF THE COUNTS SHOULD HAVE BEEN DISMISSED DUE TO VARIOUS IMPRECISIONS AND DIVERGENCES IN AND BETWEEN THE QUOTED ALLEGEDLY FALSE TESTIMONY AND THE ALLEGATIONS OF THE INDICTMENT'S "TRUTH PARAGRAPHS," THE SIXTH CIRCUIT'S DECISION IS IN CONFLICT WITH THE LIMITATIONS ON FEDERAL PERJURY PROSECUTIONS ARTICULATED BY THIS COURT IN BRONSTON V. UNITED STATES, 409 U.S. 352 (1973), AS WELL AS THE RULES FASHIONED BY OTHER CIRCUITS, ESPECIALLY THOSE DEVELOPED IN LIGHT OF BRONSTON, FOR EVALUATING AND DETERMINING THE LEGAL SUFFICIENCY OF PERJURY CHARGES. IN SO HOLDING, THE SIXTH CIRCUIT HAS ALSO SO FAR DEPARTED FROM ITS OWN APPLICABLE DECISIONS, AS TO CALL FOR THE EXERCISE OF THIS COURT'S SUPERVISORY POWERS TO CORRECT THE MISCARRIAGE OF JUSTICE WHICH PETITIONER HAS THEREBY SUFFERED. MOREOVER, THE CONFLICTING AND CONFUSING STATE OF THE LAW OF PERJURY IN THE VARIOUS CIRCUITS IN ALL THESE RESPECTS, AS IT HAS EVOLVED SINCE BRONSTON, DEMONSTRATES A CRITICAL NEED FOR THIS COURT TO CLARIFY THAT LAW AND UNIFY IT.

In response to Petitioner's facial attacks on his seven count perjury indictment (reprinted in Appendix F), the district court dismissed Counts II and V(C). The Sixth Circuit held that Counts IV and V(D) should have also been dismissed, but otherwise affirmed the conviction. It

is respectfully submitted that Petitioner's facial challenges should have resulted in a total reversal of his conviction under *Bronston v. United States,* 409 U.S. 352 (1973), the Sixth Circuit's own decisions, and parallel decisions of other circuits.[15] The Sixth Circuit's opinion referenced *Bronston, Eddy* and *Wall,* but ignored the many parallel decisions of other circuits which Petitioner urged on appeal, including cases on which the Sixth Circuit's opinion in *Eddy* was grounded.

The opinion below (the "opinion") is internally inconsistent because its holdings of reversal *versus* affirmance simply can*not* be reconciled as a matter of what in most instances is an *un*articulated conclusory *result*[16], and, where the Sixth Circuit's partially expressed uncertain reasoning *can* be gleaned, the same reasoning as applied by the Court to reverse some counts, should have compelled reversal of those left undisturbed.[17]

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[15] Although *Bronston* dealt with a conviction under 18 U.S.C. § 1621, the general perjury statute, it has been universally applied to the perjury statute involved here, 18 U.S.C. § 1623. *See, e.g., United States v. Eddy,* 737 F.2d 564 (6th Cir. 1984); *United States v. Tonelli,* 577 F.2d 194 (3rd Cir. 1978); *Cf. United States v. Wall,* 371 F.2d 398 (6th Cir. 1967), on which *Bronston* itself heavily relied in articulating various strictures against imprecise testimony and "perjury by implication" as predicates for perjury, 409 U.S. at 360-61.

[16] *E.g.,* as to Counts I, III & VI, the Sixth Circuit (App. 8) held, without elaboration, that it was "of the opinion that [said counts] did not charge defendant with perjury by implication but, instead, were sufficient, as a matter of law, to support a conviction." Similarly, the Court (App. 12) simply held, without elaboration, that "[p]arts (A) and (B) [of Count V] were sufficient to support a conviction."

[17] *E.g.,* by parity of the Court's own reasoning, and also solely by virtue of the result, with respect to the *reversal* of the con-

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Moreover, the opinion, by the very nature of its internal inconsistency, is utterly contrary to this Court's teachings in *Bronston, supra,* and the Sixth Circuit's opinions in both *Eddy* [which heavily relied on *United States v. Tonelli,* 577 F.2d 194 (3rd Cir. 1978)] and *Wall, supra,* with respect to the facial legal sufficiency of perjury indictments. This is particularly critical here given the indictment's puzzling use of frequently erroneous paraphrasings of the otherwise quoted testimony, in its "truth paragraphs." *See* n.20, *infra.*

Putting aside the foregoing conflicts, the opinion unsettles its *own* circuit's law because it incompletely and/or incorrectly articulates and applies the *Eddy* (in light of *Tonelli*) and *Wall* criteria. Petitioner has surely been denied the equal protection of that court's wise decisions, which if thoroughly and consistently applied to him would have resulted in complete reversal. In so far departing from its own applicable decisions and from the accepted and usual course of judicial procedures, the Sixth Circuit's opinion calls for this Court's supervisory review to correct what amounts to a miscarriage of justice.

An analysis of Count III (App. 32-34), which the Sixth Circuit approved without *any* elaboration, will illustrate those gross conflicts. The allegedly false testimony is first set forth, *verbatim*:

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viction under sub-part *D of Count V* (App. 12), the *other* counts which were also equally or even more flawed by woeful imprecisions in the questions, answers and truth paragraphs regarding the recurring subject matter of Petitioner's so-called "Swiss account(s)" (*i.e.*, Counts V(A), (B), (E) & VII, should have also fallen. Among other defects those counts also omitted key qualifying testimony. *See Tonelli, supra,* at 577 F.2d 198, 200.

Q. Mr. Braverman, referring to our conversation yesterday concerning the bank account Fabricora Establishment—

A. Correct.

Q. —do you recall that we discussed that yesterday?

A. [Yes].

Q. Can you tell the Grand Jury why it was that $40,000 was removed from that account and transferred to the United States for the downpayment on Reuben Sturman's son's house?

A. Can I tell you anything about it?

Q. Yes.

A. Absolutely not.

Q. Do you have any knowledge that that, in fact, was done?

A. No—excuse me. I have knowledge that a house was purchased. I have knowledge that David Sturman bought a house, yes.

Q. What you are indicating is that you had no independent knowledge of where the downpayment for that home came from; is that correct?

A. That's correct.

The *truth paragraph* (which only *paraphrases* that alleged false testimony) follows:

> "Contrary to the Defendant's testimony that he had no independent knowledge of the source of the $40,000 downpayment for David Sturman's house he had personal knowledge of the transfer of $40,000 from the Fabricora Establishment account to an escrow account for David Sturman in Cleveland, Ohio."

While that paragraph alleges, as the objective truth, that Petitioner had "knowledge of the transfer of $40,000 from the Fabricora . . . account *to an escrow account for David Sturman in Cleveland, Ohio,*" in fact there were

absolutely *no* questions or answers that made any reference to any "escrow account." Thus, Count III is fatally defective since its truth allegations fail to track the literal testimony [a failure implicitly underlying the Sixth Circuit's reversal of Count IV (App. 8-9).] *See United States v. Tonelli, supra,* 577 F.2d at 199-200; *United States v. Finucan,* 708 F.2d 838, 847 (1st Cir. 1983).[18] Count III's allegations impermissibly charge Petitioner with perjury based on the theory that the questions and answers actually asked and given, *by implication must be assumed* to include and refer to the "escrow account."[19]

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[18] The Third and First Circuits' holdings that, for a perjury charge to be sustained, the "truth paragraph" must track the allegedly false testimony, were specifically fashioned to comply with this Court's decision in *Bronston, supra. See also United States v. Eddy, supra,* at 737 F.2d 569: "[I]f the prosecutor never asks the critical question and never presses for an unequivocal answer the defendant may not be convicted of false swearing." [Quoting from *United States v. Slawik,* 548 F.2d 75, 84 (3rd Cir. 1977) wherein the Third Circuit characterized that rule as a "holding of *Bronston*".]

[19] *See United States v. Eddy, supra,* 737 F.2d at 569: "An 'intent to mislead' or 'perjury by implication' is insufficient to support a perjury conviction. [Citing *Bronston*]. . . . 'The burden is on the questioner to pin the witness down to the specific object of the questioner's inquiry.' [Citing *Bronston*]." *See Eddy* also at 567: "As the Third Circuit has noted, in perjury cases, '[n]o guessing is tolerated [in the drafting of a perjury indictment]' [citing *United States v. Tonelli, supra,* 577 F.2d at 195]"; and again at 571: " 'A charge of perjury, however, is not a substitute for careful questioning on the part of a prosecutor,' [Citing *Tonelli,* 577 F.2d at 198]. In a perjury case, the defendant 'may not be assumed into the penitentiary.' [Citation omitted]." In light of its myriad imprecisions, "[a]ny reading of the charges found in Count [III] of the indictment leads one to believe that it has failed to set forth with sufficient clarity the precise falsehood alleged, the factual basis of that falsehood and the objective truth in 'stark contrast so that the claim of falsity is clear to all who read the charge.' " *Eddy, supra,* at 571 [citing *Tonelli, supra,* at 195].

Furthermore, the prosecutor's initial puzzling query (to which Petitioner responded in the negative): "[whether he could] tell *why it was* that $40,000 was removed from that [Fabricora] account and transferred to the U.S. for the downpayment on [the] house," also undermines the legal sufficiency of the very different alleged falsehood which is paraphrased in Count III's truth paragraph: i.e., that Petitioner falsely denied knowledge "of the source" but in fact knew "of the transfer" of the funds "to an escrow account."[20]

That initial testimony provided further context for the prosecutor's *next*, impossibly ambiguous question: "Do you have any knowledge *that that*, in fact, was done?" Thus, the word "that" could have referred either to: (1) the removal of the funds from the Fabricora account; or (2) their transfer to the U.S.; or (3) the application of the funds to the purchase of the house; or (4) to Sturman's son's purchase of the house. (Equally important the word "that" could *not* refer to the key event: the transfer of

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[20] Unlike the more typical perjury indictments involved in cases like *Tonelli, supra,* which merely set forth the alleged false testimony *verbatim* and then allege the contrasting truth in the so-called "truth paragraph," most of the counts in Petitioner's indictment contain a *paraphrasing* of the alleged false testimony within each truth paragraph which is plainly at odds with the actual testimony and which, long after the fact, unfairly implies a precision originally lacking in the questions, answers and truth allegations. The Sixth Circuit's opinion, however, wholly ignores that source of fatal imprecision and instead accepts each *mis*paraphrasing of falsehood as accurate. However, those misparaphrasings further reinforce the indictment's fatal "fail[ure] to set forth with sufficient clarity the precise falsehood alleged," *Eddy, supra,* 737 F.2d at 564 (citing *Tonelli,* 577 F.2d at 195). "The most that can be said for [such] recharacterization . . . is that it reveals what the prosecutor's question[s] should have been." *United States v. Saintz,* 772 F.2d 559, 562 (9th Cir. 1985); *United States v. Slawik, supra,* 548 F.2d at 85-86.

the funds to the *"escrow account"* which was never once referred to in *any* testimony.) *See United States v. Slawik, supra,* 548 F.2d at 85 and *United States v. Lighte,* 782 F.2d 367, 376-77 (2nd Cir. 1986) [wherein the courts condemned such puzzling usage of the word "that"]. *See also, Eddy's* condemnation of a similar multiple imprecise question, 737 F.2d at 571. Moreover, Petitioner's response demonstrated that he interpreted the very ambiguous word "that" to refer to the purchase of the house. Further, the gross imprecision of *that* question compounded the ambiguity of the very *next* query which was itself fatally imprecise: *i.e., "where* the downpayment . . . came *from"* could have referred to what specific bank account those funds came from, or, instead, to the ultimate prior source(s) of the funds, *e.g.* a person, a company, a personal loan, a gift, etc. "Vague and ambiguous questions are not acceptable." *United States v. Eddy, supra,* 737 F.2d at 567 (and cases there cited including *Wall, Bronston, Finucan* and *Tonelli*).[21] That imprecision is also crit-

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[21] *See United States v. Wall, supra,* 371 F.2d at 399-400 (6th Cir. 1967) [where "question upon which . . . perjury charge [is] based, was inarticulately phrased and . . . susceptible of two different interpretations . . . no charge of perjury can be based upon an answer to such a question."] As noted in *Eddy, loc. cit., Wall* was cited with approval in *Bronston,* 409 U.S. at 360 [for *Bronston's* rule that "[t]he burden is on the questioner to pin the witness down to the specific object of . . . inquiry."] *See also United States v. Finucan, supra,* 708 F.2d at 846-48 and *Tonelli, supra,* 577 F.2d at 200. And *see United States v. Cook,* 497 F.2d 753, 764-765 (9th Cir. 1972) [as explained and quoted from by *Eddy,* 737 F.2d n. 1 and text at 567, 571]: "[Im]proper to indict and prosecute. . . for perjury where the questions forming the basis of the charge are so vaguely and inarticulate-

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ical since Count III's *truth* paragraph inconsistently alleges Petitioner's testimony to have been false because in fact he knew of the transfer of funds "*to* an *escrow account.*" Those truth allegations, like the literal testimony, are also plainly at odds with Count III's ambiguous *paraphrase* of the alleged falsehood as regarding knowledge of the "source" of the funds. The truth paragraph also neither alleges that Petitioner knew that such transfer was for the house purchase, nor that he knew such funds were so applied.

When *all* its numerous imprecisions are taken as a whole, Count III patently runs afoul of the Third and Ninth Circuits' *Bronston*-based requirement (which the Sixth Circuit adopted in *Eddy, supra*, 737 F.2d at 567, 571) that "the indictment must set out the allegedly perjurious statements and the objective truth in stark contrast so that the claim of falsity is clear to all who read the charge."[22]

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ly phrased *by the interrogator* as to require the jury to probe the inner workings of the accused's mind to seek to ascertain which of several plausible meanings he attributed to the ambiguous inquiries when he gave the allegedly perjurious responses." *See also, United States v. Saintz, supra,* 772 F.2d at 564: "A witness cannot be forced to guess at the meaning of the question to which he must respond under penalty of perjury."

[22] *United States v. Tonelli, supra,* 577 F.2d at 195 (3rd Cir.) [prefacing the quoted rule with the stricture that "[n]o guessing is tolerated" in the drafting of perjury indictments]; *United States v. Ryan,* 828 F.2d 1010, 1017 (3rd Cir. 1987) [citing to the page in the *Tonelli* opinion, 577 F.2d 195, at which the quoted rule is the *only* legal principle stated]; *United States v. Cowley,* 720 F.2d 1037, 1042-1044 (9th Cir. 1983), *cert. den.*, 465 U.S. 1029 (1984) and *United States v. Schulman,* 817 F.2d 1355, 1358 1360-1361 (9th Cir. 1987).

The Ninth Circuit's recent affirmance of the dismissal of strikingly similar perjury charges for failure to meet that "stark contrast" rule, *United States v. Schulman, supra,* 817 F.2d at 1360-1361, is virtually on all fours with that same issue here with respect to the instant Count III:

> "Count XXIII charged that Schulman lied when he denied he knew what Parallax did with the money received from the partnerships and when he said he had no first-hand knowledge concerning Parallax's depositing of the money because Schulman himself deposited the checks into the Parallax account. The government . . . asked . . . if he knew whether Parallax deposited the money from the partnerships. Schulman said he did not know. The government says that in truth Schulman acted for Parallax by initialing and depositing the deposit tickets and checks into the Parallax account . . . [and that] this contrast between the answer and the truth is sufficient for a charge of perjury. We agree . . . that there is no stark contrast between the statements because the government attorney did not ask questions specific enough to pin down precisely what Schulman's role had been. *Bronston,* 409 U.S. at 360, 93 S.Ct. at 600."[23]

In light of *all* its myriad imprecisions, Count III also violates the Third Circuit's standards which were specifi-

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[23] In upholding the dismissal of another perjury count under that same rule, the Ninth Circuit, at 817 F.2d 1360, reasoned: "What Schulman may have meant is unclear when viewed in context . . . . It was incumbent on the government attorney 'to bring the witness back to the mark, to flush out the whole truth with the tools of adversary examination.' *Bronston* . . . . Here the attorney failed 'to pin the witness down to the specific object of the questioner's inquiry.' . . . . Because the meaning of Schulman's answer is ambiguous we agree . . . that the truth paragraph did not stand out in stark contrast to the allegedly perjurious statement."

cally derived from *Bronston* and recently reaffirmed in *United States v. Ryan, supra,* 828 F.2d at 1017 (also adopted by the Sixth Circuit in *Eddy, supra,* 577 F.2d at 570-71):

> "Further, the indictment does not clearly set forth the grand jury's understanding of the question, and as we stated in *Slawik,* 'a [false statements] conviction . . . may not stand *where the indictment fails to set forth the precise falsehood alleged and the factual basis of its falsity with sufficient clarity* to permit a jury to determine its verity and to allow meaningful judicial review of the materiality of those falsehoods.' *Slawik,* 548 F.2d at 83; *see Tonelli,* 577 F.2d at 195." *United States v. Ryan, loc. cit* (emphasis added).[24]

Accordingly, *certiorari* is required to review the facial legal sufficiency of the surviving counts of the indictment herein because the Sixth Circuit's decision utterly conflicts with its own decisions, the decisions of other (principally the Third and Ninth) circuits, and this Court's decision in *Bronston v. United States, supra.*

Certiorari should also be granted on that issue because the law in this area as it has developed in the various circuits, after *Bronston,* is itself so confusing, vague, imprecise and frequently conflicting, that few called upon to interpret and enforce it may do so with any degree of

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[24] In *Slawik,* 548 F.2d at 83-84, *and Tonelli,* 577 F.2d at 196, 200, the Third Circuit first articulated the above-quoted rule which it specifically derived from *Bronston,* in holding that perjury charges were legally insufficient and should have been dismissed: "[T]o hold otherwise would permit the trial jury to inject its inferences into the grand jury's indictment, and would allow defendants to be convicted for immaterial falsehoods or for 'intent to mislead' or 'perjury by implication'—which *Bronston* specifically prohibited."

certainty. This state of the law has led to near intolerable abuses, such that perjury prosecutions for identical conduct will often generate conflicting or irrational results depending on the circuit or the reviewing panel within an individual circuit. There is thus a critical need for this Court to clarify that law and unify it with respect to the following overlapping problem areas in the federal law of perjury:[25]

1. Requirements of Precision And Clarity In the Allegations of Falsehood (Including the Effect of Imprecision In Question and Answer):

The following circuit court decisions have stringently applied *Bronston's* "precise questioning imperative" and related strictures in essentially concluding that perjury charges must fall where the question could have been interpreted in more than one way, or the meaning of the answer is left ambiguous due to imprecise questioning, or where the indictment otherwise fails to set forth the precise falsehood alleged with sufficient clarity: The Third Circuit's decisions in *United States v. Tonelli, supra, United States v. Slawik, supra;* and *see United States v. Helstoski,* 635 F.2d 200, 203, 206 (3rd Cir. 1980); the Sixth

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[25] In grappling with those problems, the district courts have also been powerfully influenced by *Bronston. See, e.g., United States v. Lovecchio,* 561 F.Supp. 221, 234 (M.D.Pa. 1983), where, in express reliance on *Bronston's* "precise questioning imperative" and related strictures, as well as the Third Circuit's "no guessing is tolerated" and "stark contrast" principles, the court ruled that "an indictment under . . . § 1623, . . . cannot be based on questions that are ambiguous or otherwise unclear and the equally uncertain answers thereto. Such an indictment would violate the standard . . . that '[e]specially in perjury cases, defendants may not be assumed into the penitentiary' [citation omitted]."

Circuit's decisions in *United States v. Eddy, supra, and, pre-Bronston, United States v. Wall, supra;* the Ninth Circuit's decisions in *United States v. Cook, supra; United States v. Cowley, supra;* and *United States v. Schulman. See,* again, the First Circuit's decision in *United States v. Finucan, supra.* And to the same or similar effects, *see United States v. Larranga,* 787 F.2d 489, 497 (10th Cir. 1986); *United States v. Vesaas,* 586 F.2d 101 (8th Cir. 1981); and *United States v. Brumley,* 560 F.2d 1268, 1275-1277 (5th Cir. 1977) ["this attempted foundation for a perjury prosecution fails for lack of specificity, for lack of the critical question, and for lack of the unequivocal answer."][26]

Compare, with the foregoing cases, the following decisions evincing contrary, often far more subjective approaches which typically apply *Bronston* restrictively and tend to narrowly look to the question or answer in isolation and to the exclusion of all other factors or sources of imprecision: *United States v. Lighte,* 782 F.2d 367 (2d Cir. 1986) [*Cf. United States v. Bell,* 623 F.2d 1132 (5th Cir. 1980)]; *United States v. Caucci,* 635 F.2d 441 (5th Cir. 1981); *United States v. Haimowitz,* 725 F.2d 1561 (11th Cir. 1984); *United States v. Beitling,* 545 F.2d 1106 (8th Cir. 1976); *United States v. Kehoe,* 562 F.2d 65 (1st Cir. 1977); *United States v. Morales,* 815 F.2d 725 (1st Cir. 1987); *United States v. Petzold,* 788 F.2d 1478 (11th Cir. 1986); *United States v. Chapin,* 515 F.2d 1274 (D.C.

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[26] In so holding, *Brumley* concluded its analysis by articulating the principle that "[e]specially in perjury cases, defendants may not be assumed into the penitentiary." *Brumley* derived that principle from *Bronston's* "precise questioning imperative" and the corollary burden on the questioner "to pin the witness down."

Cir. 1975); *United States v. Sampol*, 636 F.2d 621 (D.C. Cir. 1980).

As may be true of the Sixth Circuit's opinion in this case and its flagrant disregard of that Court's own wise decisions, the decision in *United States v. Lighte, supra*, a case relied on by the government on Petitioner's appeal, shows how very unclear, uncertain, and uncomfortable the Second Circuit is with its confusing law in these areas, and that it, like other circuits, is groping for approaches and desperately in need of guidance from this Court. In *Lighte*, after first candidly admitting that its "fundamentally ambiguous" test "has itself proven to be fundamentally ambiguous," *Id.* 782 F.2d at 375, the Court proceeded to strike down two perjury counts for ambiguity in the underlying questions. *Id.* at 375-376. The Court then analyzed "another series of questions that, while perhaps not fundamentally ambiguous were at least most inartfully phrased." After characterizing those questions as "puzzling" and "completely amorphous," the Court concluded that "more focused questions should have been asked." *Id.* at 376. But rather than invalidating the charges premised on those questions, the Court held that at retrial on those and other counts, "it would appear that in the exercise of his discretion the prosecutor should withdraw reliance on those questions." *Id.* at 377.[27]

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[27] Compounding that confusion, in *United States v. Ryan, supra*, 828 F.2d at 1015-1017, while otherwise reaffirming the requirements of specificity, clarity and precision imposed by *Tonelli* and *Slawik*, the Third Circuit also suggested that the Second Circuit's fundamentally ambiguous "fundamental ambiguity" test should also govern the effect of imprecise questioning in all types of perjury or false statement prosecutions. And see *United States v. Qaoud*, 777 F.2d 1105, 1114 (6th Cir. 1985).

2. Requirements of Allegation, Precision and Clarity Regarding the Objective Truth:

The Third Circuit's requirement that perjury charges allege the objective truth, within a so-called truth paragraph which must "set forth the precise . . . factual basis of . . . falsity with sufficient clarity," *United States v. Slawik, supra, United States v. Tonelli, supra, United States v. Helstoski,* 635 F.2d 200, 203, 206 (3rd Cir. 1980), *United States v. Ryan, supra,* has been followed by the Sixth Circuit in *United States v. Eddy, supra.*

Although in *United States v. Brumley, supra,* the Fifth Circuit followed that rule, the theory that a truth paragraph must be included has been rejected, in *United States v. Oberski,* 734 F.2d 1034, 1035 n.1 (5th Cir. 1984), and by the Second and Seventh Circuits in *United States v. Marchisio,* 344 F.2d 653, 662 (2nd Cir. 1965) and *United States v. Serola,* 767 F.2d 364, 369-70 (7th Cir. 1985), at least where the perjury indictment "contains clear, direct, unambiguous and precise questions and answers" as in *Serola, Id.* Moreover, those circuits have not only left open the possibility that truth allegations may be required in some as yet undefined circumstances, but they have also failed to address the question of what precision and clarity should be required of a truth paragraph should the government *choose* to include it, as in *this* case. Adding a further wrinkle to this confusion and conflict, although the Ninth Circuit is similarly unclear as to when a truth paragraph may be required, *see, e.g., United States v. DeCoito,* 764 F.2d 690, 693 (9th Cir. 1985) ["Cases may arise in which, without an allegation of truth, the indictment will not be sufficient"], it *has* approached the prob-

lem of precision and clarity in truth allegations by adopting the Third Circuit's "stark contrast" requirement, as noted *infra*.

3. Relationships Between (Including the Effect of Imprecision in) the Allegations of Truth and Falsity:

The Third Circuit's rule that perjury charges must set out in "stark contrast" the allegedly false statements and the objective truth, as established by *Tonelli, supra,* and reaffirmed in *Ryan, supra,* 828 F.2d at 1017 (3rd Cir. 1987), and *Helstoski, supra,* 635 F.2d at 203, 206 (3rd Cir. 1980), has been followed by the Sixth and Ninth Circuits, in *Eddy, supra, United States v. Schulman, supra,* and *United States v. Cowley, supra,* but has apparently not been adopted or even cited by any other circuits. While as previously mentioned, the Ninth Circuit decisions are unclear as to when truth allegations must be included in the first instance, they are equally *clear* that when a perjury indictment *does* contain a truth paragraph, the "stark contrast" rule applies. *Schulman,* and *Cowley,* both *supra.* The Third Circuit's corollary principle that the truth paragraphs must "track" the literal allegedly false testimony, *Tonelli, supra,* has been followed by the First Circuit, in *United States v. Finucan, supra,* but has apparently never been reflected in the decisions of any other circuits except in *United States v. Schmidt,* 711 F.2d 595, 597 (5th Cir. 1983), *cert. den.,* 464 U.S. 1041 (1984).

As the foregoing demonstrates, there is a critical need, which only this Court can effectively supply, for uniform and predictable rules under a unified approach that will permit lower federal courts to identify *any* imprecision

in perjury indictments and keep those courts appropriately alert to the dangers of such imprecision and the unfairness thereby posed to those accused under such charges, who may otherwise be "assumed into the penitentiary" for "perjury by implication."

CONCLUSION

Accordingly, *certiorari* should be granted in this case, both to vindicate the wrong suffered by Petitioner, and also to articulate clear and discernable rules and procedures for *all* to follow in this murky and potentially perilous area which is so very susceptible to confusion and abuse. This Court's review is further required to vindicate congressional purpose by making the statutory right of recantation meaningful and efficacious.

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Respectfully submitted,

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